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Assessment roll

Bonds issued by Co authorities

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 729.

GEORGE O. MARCY, PLAINTIFF IN ERROR,

vs.

THE TOWNSHIP OF OSWEGO, IN THE COUNTY OF LABETTE AND STATE OF KANSAS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 16, 1875.

Jno Strong

SUPREME COURT OF THE UNITED STATES.

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3 In the circuit court of the United States for the district of Kansas.

GEORGE O. MARCY
vs.
THE TOWNSHIP OF OSWEGO.

Be it remembered that on the 14th day of February, 1874, the said plaintiff filed in the clerk's office of said court his petition, precipe, and security for costs in said entitled cause, which said petition, precipe, and security for costs, with the endorsements thereon, are in the words and figures following, to wit:

Petition.

In the circuit court of the United States for the district of Kansas.

GEORGE O. MARCY
vs.
THE TOWNSHIP OF OSWEGO. } Petition.

The plaintiff, who is a resident and citizen of the State of Massachusetts, complains of Oswego Township, a municipal township situate in the county of Labette, in the State of Kansas, and organized under and by virtue of the laws of said State, and a citizen of said State of Kansas, and for thirty causes of action alleges the following facts: That on the first day of July, 1870, the board of county commissioners of said county did cause to be issued, in the name of said township, and to be signed by the chairman of said board and attested by the clerk
4 of said county, under the seal of said county, thirty bonds of one thousand dollars each, and the defendant did thereby execute to the Missouri, Kansas & Texas Railway Company or bearer its thirty bonds of one thousand dollars each, which said bonds are numbered, respectively, as follows, Nos. 1, 28, 29, 30, 31, 32, 34, 42, 43, 47, 48, 49, 54, 55, 57, 61, 63, 67, 68, 78, 83, 84, 88, 89, 91, 94, 95, 96, 97, & 98, a copy of which bonds is hereto attached and marked "Exhibit A," and made a part of this petition, whereby the defendant for value received promised to pay to the said railway company or bearer in each of said bonds the sum of one thousand dollars, with interest thereon at the rate of seven per cent. per annum, on the first day of July, A. D. 1870, at the Tenth National Bank in the city of New York, the interest aforesaid being also payable at said bank on the first day of July in each year, on presentation & surrender of the proper coupons annexed to said bonds, as they severally became due.

That attached to each of said thirty bonds were among others certain coupons executed by the defendant in the same manner as the bonds above described, whereby the defendant promised to pay to the bearer thereof seventy dollars at the Tenth National Bank in the city of New York on the first day of July, 1873, being one year's interest on each of said bonds then and there to be due, which coupons are in words & figures as follows:

5 State of Kansas. $70.

The township of Oswego, county of Labette, will pay to the bearer hereof seventy dollars, at the Tenth National Bank in the city of New

York, on the first day of July, A. D. 1873, being one year's interest on their bond No. .

WILLIAM STEEL,
Chairman.
S. C. HOWARD, *Clerk.*

That after the issue of the said bonds and before the maturity of the coupons sued on, to wit, on the 29th day of May, 1872, the said bonds, with the said coupons attached thereto, were presented to the auditor of the State of Kansas for registration, and the said auditor of the State of Kansas, then being duly empowered and authorized so to do, did register the said bonds in the office of the auditor of the State according to law, and in writing certified such registration upon each of such bonds, attested by the seal of the auditor of the said State of Kansas. A copy of the certificate of registration is filed herewith and made part hereof, marked "Exhibit B."

And the plaintiff says that afterwards he became and is the owner and holder of said thirty coupons, and that on the first day of July, 1873, said coupons were presented at said Tenth National Bank of New York for payment, and payment thereof was refused, and said township, although often requested, has never paid said coupons to the plaintiff.

6 Whereupon an action hath accrued to the plaintiff to have and recover from the defendant the sum of twenty-one hundred dollars, with interest thereon at the rate of seven per cent. per annum, from said 1st day of July, 1873, for which amount the plaintiff asks judgment, with costs.

ALFRED ENNIS,
C. M. FOSTER,
Attys. for Plffs.

WALSER & CUNNINGHAM,
Of Counsel.

EXHIBIT A.

$1,000.

UNITED STATES OF AMERICA,
State of Kansas, Township of Oswego, Labette County:

Know all men by these presents that the township of Oswego, in the county of Labette, State of Kansas, hereby for value received acknowledges itself to owe and promises to pay the Missouri, Kansas & Texas Railway or bearer one thousand dollars lawful money of the United States of America, which sum of money the said township of Oswego promises to pay on the first day of July, A. D. 1890, at the Tenth National Bank in the city of New York, with interest thereon at the rate of seven per centum per annum, payable at said national bank on the first day of July in each year, on presentation and surrender of the annexed coupons as they severally become due. This bond is executed and issued by virtue of and in accordance with an act of the legislature of said State of Kansas entitled "An act to enable municipal town-

7 ships to subscribe for stock in any railroad, and to provide for the payment of the same," approved February 25th, 1870, and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870.

In testimony whereof the board of county commissioners of the said county of Labette has caused this bond to be issued, in the name and in

behalf of said township of Oswego, and to be signed by the chairman of said board of county commissioners and attested by the county clerk of the said county under its seal, this 1st day of July, A. D. 1870.

L. C. HOWARD, *Clerk.*
[SEAL OF LABETTE CO., KANSAS.] WILLIAM STEEL, *Chairman.*

B.

On the back of which bond is the following certificate, to wit:

I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the legislature entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds
for the purpose of building bridges, aiding in the construction of
8 railroads or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2nd, 1872.

Witness my hand and official seal this 29th day of May, 1872.

{SEAL OF THE AUDITOR OF STATE, KANSAS, JAN. 29, 1861.} A. THOMAN, *Auditor of State.*

Precipe.

In the United States circuit court for the district of Kansas.

GEORGE O. MARCY *vs.* THE TOWNSHIP OF OSWEGO. } Precipe.

The clerk will issue a summons for the defendant, returnable according to law. The plaintiff asks judgment for $2,100, with interest thereon at 7 per cent. per annum, from the 1st day of July, 1873.

ALFRED ENNIS,
C. M. FOSTER,
Attys. for Plffs.

(Endorsed:) 949. George O. Marcy vs. Oswego Township. Petition & precipe. Filed Feb. 14, 1874. A. S. Thomas, clerk.

Security for costs.

In the circuit court of the United States for the district of Kansas.

GEORGE O. MARCY *vs.* THE TOWNSHIP OF OSWEGO.

9 I enter myself security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by me, I hereby agree and stipulate that execution may issue against my property for any costs taxed against me.

Dated this 14th day of February, 1874

C. M. FOSTER.

(Endorsed:) 949. George O. Marcy vs. Oswego Township. Security for costs. Filed February 14, 1874. A. S. Thomas, clerk.

And on this day, to wit, February 14th, 1874, the clerks of said court issued a summons in said entitled cause, which summons, with the marshal's return thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America to the marshal of the district of Kansas, greeting:

You are hereby commanded to notify the township of Oswego, in the county of Labette, and State of Kansas, that it has been sued by George O. Marcy in the circuit court of the United States for the district of Kansas, and that unless it answers by the 16th day of March, A. D. 1874, the petition of the said George O. Marcy against it, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 24th day of March, A. D. 1874.

Witness the Hon. Nathan Clifford, presiding justice of the Supreme Court of the United States of America, at Topeka, in said district, this 14th day of March, A. D. 1874.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:)
Suit brought for the recovery of money. Amount claimed, $2,100.00, with interest from the 1st day of July, A. D. 1873, at the rate of 7 per cent. per annum. Alfred Ennis & C. M. Foster, attorneys for plaintiff. No. 949. Circuit court of the United States, district of Kansas. George O. Marcy vs. Oswego Township. Summons. Issued Feby. 14, 1874; returnable Feb. 24, 1874. Ennis & Foster, attorney' for plaintiff.

DISTRICT OF KANSAS, *ss:*

Recd. the within writ of summons Feb. 20th, 1875; executed the same at Labette County, State and dist. of Kansas, personally, on this 21st day of February, 1874, by delivering a certified copy to Cave Montague, township trustee of Oswego Township, and a certified copy to A. C. Baker, township clerk of Oswego Township, with all the endorsements thereon, of this the within writ of summons.

W. S. TOUGH,
U. S. Marshal,
By W. A. MADARIS,
Deputy.

Fees: Service, $4.00.

(Endorsed:) Filed Feb. 26, A. D. 1874. A. S. Thomas, clerk.

And on this day, to wit, March 12, 1874, the said defendant filed in the clerk's office of said court its answer in said entitled cause, which answer, with the endorsements thereon, is in the words and figures following, to wit:

Answer.

In the circuit court of the United States for the district of Kansas.

GEORGE O. MARCY, PLAINTIFF,
vs.
THE TOWNSHIP OF OSWEGO, DEFENDANT. } Answer.

1st. Now, at this time, comes the defendant, by its attorneys, David Kelso, F. A. Bettis, and H. G. Webb, and, answering the petition of the said plaintiff in said cause filed, denies each and every material allegation in said petition stated, except as is hereinafter specifically admitted.

2nd. And, for a second and further defence to the said petition, the said defendant alleges that on the 1st day of July, 1870, nor at any other time, the board of county commissioners of Labette County, Kansas, were not the agents, either general or special, of this defendant, and had no authority from this defendant, for it or in its name, to make, execute, and deliver the pretended bonds and coupons thereto, as in said petition set forth, to the Missouri, Kansas & Texas Railway Company, or to any other corporation or person; that on the 1st
12 day of July, 1870, the value of the taxable property of the township of Oswego did not exceed the sum of three hundred & fifty-two thousand dollars, nor had the same at any time theretofore exceeded said sum; that an act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, passed by the legislature of the State of Kansas & approved by the governor thereof February 25th, 1870, was then in full force and effect in the State of Kansas, and binding upon this defendant, and by virtue of said act said defendant was prohibited from issuing any amount of bonds which should require a levy of more than one per cent. per annum on its taxable property to pay the yearly interest thereon; that the pretended bonds described in said petition and the said pretended coupons sued upon were and are part of an issue of one hundred pretended bonds, each for the sum of one thousand dollars, with similar interest-coupons attached to each and every one thereof, each and all of which were issued by said board of county commissioners on said first day of July, 1870, in the name and by the pretended authority of said township, given under the act aforesaid; that said bonds so issued amounted, in the aggregate, to the sum of one hundred thousand dollars, and then exceeded largely the amount authorized by law to be
13 issued by said defendant, and thereupon the said board of county commissioners, without having received or subscribed for, or caused to be subscribed for, any stock of the said Missouri, Kansas and Texas Railway, for and on behalf of this defendant, and without having received any other consideration for said bonds, for and in behalf of said defendant, delivered the said bonds, with the coupons sued upon in this action, to the said Missouri, Kansas & Texas Railway Company, which said delivery the defendant alleges was fraudulent and void.

3rd. For a third and further defence to said action of the plaintiff, the defendant alleges that, without any authority of law whatever, the bonds described and the coupons sued upon were on the 1st day of July, 1870, executed by the board of commissioners of the county of Labette against the express direction of this defendant made in writing, and that afterwards, to wit, on the 14 day of December, 1870, the said board of county commissioners passed over the said bonds to the Missouri, Kansas & Texas Railway Company, against the express order and direc-

tion of the said defendant, and without any authority of law therefor, and that while the said bonds thus illegally delivered as aforesaid were in the possession of the Missouri, Kansas & Texas Railway Company, the defendant commenced an action in the district court of the State of Kansas, held within and for Labette County, Kansas, on the
14 14 day of December, 1870, against the said Missouri, Kansas & Texas Railway Company for the purpose of having said bonds declared by the judgment of the said court to be null and void because of their illegality as aforesaid, and, as auxiliary relief to said action, the said defendant obtained from said court, while said bonds were in the possession of said railway company, an order of injunction, directed to said railway company, commanding its agents and servants to refrain from negotiating the said bonds, which said order was duly served on said railway company. And the said defendant alleges that such proceedings were had in said action so begun by it in the district court of Labette County, Kansas, against the said Missouri, Kansas & Texas Railway Company as aforesaid; that the said railway company answered the petition of the said defendant therein, and on the 6th day of January, 1872, the same being the first adjourned term of the November term of said court, held at Oswego, in the county of Labette, Kansas, 1871, the said cause came on for hearing, the said bonds being still in the possession of said railway company, and this defendant, the township of Oswego, and the said railway company, by its attorney as aforesaid, presented the said action to the district court of Labette County, Kansas, at said term, for its determination upon the proofs and
15 arguments submitted; and the district court thereupon ordered and adjudged that the said bonds were void in law; and further ordered and adjudged that the temporary injunction restraining the said railway company, its agents and servants, from negotiating the said bonds before that time issued in said action and served as aforesaid should be made perpetual; and further ordered and enjoined the said railway company to surrender the said bonds to the trustee of this defendant to be cancelled. An exemplified copy of the record in said action is hereto attached and made a part of this action, marked "Exhibit A."

Wherefore the said defendant alleges that before the said plaintiff became the owner of the coupons sued upon, and before the said railway company parted with the possession thereof, they were duly adjudged by the district court of Labette County, Kansas, to be void, of which the said plaintiff had due notice; which judgment is still in full force.

And wherefore the said defendant alleges that the coupons sued upon in this action are void, and the plaintiff ought not to have and maintain his action against this defendant.

DAVID KELSO,
F. A. BELLIS, AND
H. G. WEBB,
Attys. for Defendant.

16 In the Labette County district court.

STATE OF KANSAS,
County of Labette:

THE TOWNSHIP OF OSWEGO
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY Company. } Amended petition.

The said plaintiff, the township of Oswego, a municipal body-cor-

porate within the county of Labette, and duly organized under the laws of the said State of Kansas, files this its amended petition in the case wherein the township of Oswego is plaintiff and the board of county commissioners of the county of Labette, in State of Kansas, and the Missouri, Kansas & Texas Railway Company are defendants, and avers that the said defendant, the said Missouri, Kansas & Texas Railway Company, is a corporate body, duly organized under the laws of the State of Kansas, and have a railroad that passes through the said county of Labette, and operate the same.

Plaintiff further avers that the board of county commissioners of the said county of Labette did, on the first day of July, 1870, without authority of the said plaintiff and *and* contrary to law, execute and issue one hundred bonds of the denomination of one thousand dollars each, payable to the said Missouri, Kansas & Texas Railway Company or bearer, at the Tenth National Bank in the city of New York, on
17 the first day of July, A. D. 1890, with interest thereon at the rate of seven per centum per annum, payable at said national bank on the first day of July in each year, which said bonds purport to be bonds of the said township of Oswego, and to bind the said township to pay upon each of said bonds to the said Missouri, Kansas & Texas Railway Company or bearer the sum of one thousand dollars, at said national bank, with interest thereon as aforesaid, which said bonds have coupons for said interest thereto annexed. Said bonds upon their face purport to have been executed and issued by virtue of and in accordance with an act of the legislature of said State of Kansas, entitled "An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same," approved February 25th, A. D. 1870, and in pursuance of and in accordance with the vote of three-fifths of the legal voters of the said township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870, whereas, in truth and in fact, the said bonds were executed and issued without authority of the said township of Oswego, and in violation of said act of the said legislature; for the said plaintiff avers & declares that said bonds, executed and issued by said board of county commissioners to the said Missouri, Kansas & Texas Railway Company, amount in the aggre-
18 gate to the sum of one hundred thousand dollars, and that the yearly interest thereon amounts to the sum of seven thousand dollars, and the payment of which said interest will require a levy of more than one per cent. per annum on the taxable property of the said township of Oswego; for the plaintiff avers that the assessed valuation of all the taxable property, both real and personal, of the said township of Oswego, for the year 1870, did not exceed the sum of three hundred and ninety-six thousand and sixty dollars.

Plaintiff further avers that, on the 14th day of December, 1870, the said board of county commissioners, though unauthorized by any law of the said State of Kansas, and without authority of the said township of Oswego, delivered said bonds to the said Missouri, Kansas & Texas Railway Company; that the county clerk of Labette County, Kansas, did not subscribe for stock in said railway company for the said plaintiff, as required by law, nor did said defendant ever deliver, or offer to deliver, to plaintiff any stock, or certificate of stock, or evidence of stock in said railway company, in lieu or in consideration of said bonds, as contemplated by law, nor has plaintiff ever received any consideration therefore.

Plaintiff further avers that, while said illegal bonds are outstanding, the credit of said township of Oswego is greatly damaged and the

19 material prosperity thereof greatly retarded, and that the negotiation and transfer of said bonds by the said railway company will subject the said plaintiff to vexatious litigation, and produce irretrievable loss and irreparable injury and damage; that said defendant threatens to negotiate and dispose of said bonds.

Plaintiff therefore demands that by judgment of this court the said bonds, with the coupons thereto annexed, be cancelled, and declared absolutely null and void, and that during the litigation the said railway company and its agents or agents, and any and all persons holding said bonds for the use and benefit of said railway company, be restrained from negotiating and disposing of said bonds to any person or persons whomsoever, and for such other relief as the facts above stated may entitle the said plaintiff.

ADAMS, BROWN & GLASSE, AND
BETTIS & KELSO.

STATE OF KANSAS,
County of Labette:

C. F. Winton, being first duly sworn, says that he is the trustee of the township of Oswego, in the said county of Labette; that the several matters and things contained in the above petition are true in substance and in fact, and the said several matters and things were, on the
20 14th day of December, 1870, true in substance and in fact.

C. F. WINTON,
Trustee of Oswego Tp.

Subscribed in my presence and sworn to before me this fifth day of June, 1871.

DAN. S. MORRISON,
Clerk of District Court, Labette County, Kansas.

(Endorsed as follows:) In Labette County district court. Township of Oswego vs. Missouri, Kansas & Texas Railway Company. Amended petition. Filed June 5th, 1871. Dan. S. Morrison, dist. clerk. Adams, Brown & Glasse, and Bettis & Kelso, attys. for plff.

In the district court of the said county.

STATE OF KANSAS,
Labette County, ss:

OSWEGO TOWNSHIP, PLAINTIFF,
against
THE M., K. & T. R. W. CO., DEFT. } Answer.

And now at this time comes the said defendant, by its attorneys, Davis & Perkins, and, by leave of the court first had and obtained herein, for answer to the plaintiff's petition filed herein says, that it admits that it is a body corporate, duly organized under the laws of the State of Kansas, and the owner of a railroad passing through the said county of Labette and operating the same, and further admits the reception of the bonds described in the said plaintiff's petition, and that they were
21 issued & delivered by the board of county commissioners of Labette County, Kansas, as charged in the said petition; but denies that they were unauthorized and illegally issued, as charged in the said plaintiff's petition, and denies each and every other material allega-

tion in the said plaintiff's petition contained; and this they are ready to make appear.

T. C. SEARS,
DAVIS & PERKINS,
Attys. for Defendant.

(Endorsed as follows:) No. 280. In the dist. court of Labette County, Kansas. Oswego Township, plaintiff, against The M., K. & T. R. W. Co., defts. Answer. Filed November 17th, 1871. Dan. S. Morrison, clk., by R. J. Elliott, dept'y clk. T. C. Sears, Davis & Perkins, attys. for deft.

In the district court of Labette County, Kansas.

THE TOWNSHIP OF OSWEGO, LABETTE COUNTY, Kansas,
against
THE MISSOURI, KANSAS AND TEXAS RAILWAY Company, &.

FINDINGS OF FACT.

The court having heard the evidence and argument of counsel in the foregoing cause, and the cause being submitted, doth find as matters of fact as follows:

1st. That the defendant, The Missouri, Kansas & Texas Railway, is a corporation duly organized under the law.

22 2nd. That the value of the taxable property of the plaintiff for the year 1870 was three dollars.

3rd. That no preliminary petition for an election in said township for any bonds, signed by the proper number of freeholders of the said township, was ever presented to the board of county commissioners of Labette County, Kansas.

4th. That no subscription to the capital stock of the Missouri, Kansas & Texas Railway Company, the defendant, was ever made for or in behalf of the said township.

5th. That the board of county commissioners caused to be signed one hundred bonds, numbered from one to one hundred, inclusive, each for the sum of one thousand dollars, and made payable to the Missouri, Kansas & Texas Railway, or bearer, with interest-coupons attached thereto at seven per cent. interest per annum.

6th. That said bonds were so signed against the express direction of the plaintiff.

7th. That the said bonds were signed by L. C. Howard, county clerk of Labette County, Kansas, and given into the actual possession of the defendant, The Missouri, Kansas & Texas Railway Company, against the direction and authority of the plaintiff.

8th. That said plaintiff neither received any stock or certificates of stock in said Missouri, Kansas & Texas Railway Company, or

23 other consideration for said bonds.

9th. That the said bonds are still in the actual possession of the defendant, The Missouri, Kansas & Texas Railway Company.

FINDINGS OF LAW.

1st. The election held, under the authority of which said bonds were issued, was void and of no effect.

2nd. That said board of county commissioners were not the agents of the plaintiff to issue said bonds.

3rd. That said bonds were in excess of the authority of the plaintiff itself.

4th. That said bonds were and are without any consideration.

5th. That said bonds are not the act of the plaintiff, and are void in law.

6th. That the temporary order of injunction in this cause was properly issued, and ought to be made perpetual.

In the Labette County district court, November adjourned term, 1871, January 6th, 1872, the following, among other proceedings, were had, to wit: * * * * *

THE TOWNSHIP OF OSWEGO
against
THE MISSOURI, KANSAS & TEXAS RAILWAY Company and the Board of County Commissioners of Labette County. } No. 280.

24 Now, at this day, the above-entitled cause coming on to be heard on the issues joined, the plaintiff, The Township of Oswego, appeared, by its attorneys, Bettis & Kelso & Broom & Glass, and the defendants, The Missouri, Kansas & Texas Railway Company and The Board of County Commissioners of Labette County, by their attorneys, T. C. Sears and B. W. Perkins, and the trial of this cause being to the court, and the court having heard the evidence and arguments of counsel, and duly considered the matters and things therein—

It is considered and adjudged by the court that the bonds of the said township of Oswego numbered from one to one hundred, inclusive, held by the said defendant, The Missouri, Kansas and Texas Railway Company, with the interest-coupons thereto attached, be, and hereby are, declared null and void, and the temporary injunction heretofore issued in this cause and served upon said defendants restraining said defendant from negotiating or disposing of said bonds, by itself or by its agents, be, and the same is hereby, made perpetual, and the said defendant is hereby perpetually enjoined from disposing of or negotiating said bonds. And the said defendant is hereby enjoined & commanded to deliver the said bonds to the trustee of the said plaintiff, The Township of Oswego, to be cancelled; and it is further adjudged that the said plaintiff
25 pay all the costs accrued in this action which have not been paid.

* * * * * * *

STATE OF KANSAS,
Labette County:

I, R. J. Elliott, clerk of the district court in and for said county & State, do hereby certify that the above and foregoing is a true and correct copy of the petition, answer, findings, & judgment of the court in the case of The Township of Oswego against The Missouri, Kansas & Texas Railway Company & The Board of County Commissioners of Labette County, as fully as the same appears from the files and records now in my office.

Witness my hand and seal of office this 10th day of March, 1871.

[SEAL.] R. J. ELLIOTT,
Dist. Court Clerk.

THE UNITED STATES OF AMERICA,
State of Kansas, Leavenworth County:

C. Montague, being first duly sworn, says that he is the trustee & agent of the township of Oswego, which said township of Oswego is the defendant in the action pending in the circuit court of the 8th circuit for the dist. of Kansas, wherein George O. Marcy is plaintiff and
26 said township of Oswego is defendant; says that he has read over the foregoing answer of said defendant in said cause, and that the 2nd and third counts or defences therein set forth are true.

C. MONTAGUE.

Subscribed and sworn to before me this 3rd day of June, 1874.

A. S. THOMAS,
Clerk Circuit Court.
C. MONTAGUE,
Township Trustee.

(Endorsed:) No. 949. Circuit court U. S., district of Kansas. Geo. O. Marcy vs. The Township of Oswego. Answer. Filed March 12, 1874. A. S. Thomas, clerk.

And on this day, to wit, March 25, 1874, the said plaintiff filed in the clerk's office of said court his demurrer to the 2nd paragraph of defendant's answer in said entitled cause, which demurrer, with the endorsements thereon, is in the words and figures following, to wit:

Demurrer.

In the circuit court of the United States for the district of Kansas.

GEORGE O. MARCY
vs.
OSWEGO TOWNSHIP. } Demurrer.

The plaintiff demurs to the second ground of defense contained in the defendant's answer, for the reason that the facts therein contained
27 do not constitute a defense to the plaintiff's cause of action, as alleged in his petition.

ALFRED ENNIS,
C. M. FOSTER, AND
WALSER & CUNNINGHAM,
Attys. for Plff.

(Endorsed:) No. 949. Geo. O. Marcy vs. Oswego Township. Demurrer. Filed March 25, 1874. A. S. Thomas, clerk.

And on this day, to wit, March 25, 1874, the said plaintiff filed in the clerk's office of said court his reply in said entitled cause, which reply, with the endorsements thereon, is in the words and figures following, to wit:

Reply.

In the circuit court of the United States for the district of Kansas.

GEORGE O. MARCY
vs.
OSWEGO TOWNSHIP. } Reply.

The plaintiff, for reply to the third ground of defense contained in the

defendant's answer, says that he admits that the proceedings were had in the Labette County district court as are alleged in the defendant's answer, wherein the defendant herein was plaintiff and the Missouri, Kansas & Texas Railroad Company were defendants, but the plaintiff says that he was not a party to said proceedings, and had no notice thereof, but purchased said bonds and coupons in the usual course of business, and is a bona-fide owner and holder thereof.

ALFRED ENNIS,
C. M. FOSTER,
28 WALSER & CUNNINGHAM,
Attys. for Plff.

(Endorsed :) No. 949. Geo. O. Marcy vs. Oswego Township. Reply. Filed Mch. 25, 1874. A. S. Thomas, clerk.

And on this day, to wit, June 3, 1874, in the June term, A. D. 1874, of said court, in the record of the proceedings thereof, is the following entry, to wit:

Journal-entry.

GEORGE O. MARCY
vs. } 949.
THE TOWNSHIP OF OSWEGO.

Now comes the said defendant, by Kelso, Bettis & Webb, its attorneys, and moves the court for leave to verify the answer heretofore filed herein; which motion, after argument of counsel had thereon, is sustained, and it is considered and ordered by the court that said defendant have leave to verify its answer herein forthwith.

And on this day, to wit, June 4, 1874, in the June term, A. D. 1874, of said court, in the record of the proceedings thereof, is the following entry, to wit:

Journal-entry.

GEORGE O. MARCY
vs. } 949.
THE TOWNSHIP OF OSWEGO.

29 Now come the parties hereto, by their attorneys, and thereupon the demurrer of the plaintiff to second ground of defense is overruled and the plaintiff granted leave to reply within 30 days, and case continued.

And on this day, to wit, November 26, 1874, the said plaintiff filed in the clerk's office of said court his reply in said entitled cause; which reply, with the endorsements, is in the words and figures following, to wit:

Reply.

In the U. S. circuit court for the district of Kansas.

GEORGE O. MARCY
vs. } Reply.
OSWEGO TOWNSHIP.

1st. The plaintiff, for reply to the second paragraph of defendant's an-

swer, says that he denies each and every material allegation therein contained.

2nd. And, for further reply to the second paragraph of the defendant's answer, plaintiff says that he admits that the bonds to which the interest-coupons sued on belong are a part of a series of one hundred bonds, of one thousand dollars each, issued by the said township of Oswego, as in the said second paragraph of said answer alleged, but now alleges the truth and fact to be that the said bonds to which the said interest-coupons sued on belong are the first thirty in number of said series that have been presented for collection, and upon which payment has been demanded.

30 Wherefore plaintiff prays judgment as in his petition set forth.

ENNIS, FOSTER & BROWN,
Attys. for Plff.

(Endorsed:) No. 949. George O. Marcy vs. Oswego Township. Reply. Filed Nov. 26, 1874. A. S. Thomas, clerk. Ennis, Foster & Brown, attys. for plff.

And on this day, to wit, November 25, 1874, in the November term, A. D. 1874, of said court, in the record of the proceedings thereof, is the following entry, to wit:

Journal-entry.

GEORGE O. MARCY
vs. } 949.
THE TOWNSHIP OF OSWEGO.

Continued to next term of this court.

Journal-entry.

GEORGE O. MARCY
vs. } 949.
THE TOWNSHIP OF OSWEGO.

Now come the parties herein, by their attorneys, and on motion of the defendant, by Bettis, its attorney, it is ordered by the court that the order for continuance entered at this term be, and the same is hereby, set aside, and, on motion of plaintiff, by Ennis & Foster, his attorneys, it is ordered by the court that he have 60 days from this date in which to amend petition, copy of said amended petition to be served on defendant, and this case continued to the next term.

31 And on this day, to wit, January 28, 1875, the said plaintiff filed in the clerk's office of said court his amendment to petition in said entitled cause; which amendment, with the endorsements thereon, is in the words and figures following, to wit:

Amendment to petition.

In the circuit court of the United States for the district of Kansas.

GEORGE O. MARCY, PLAINTIFF,
vs. } Amendment to petition.
THE TOWNSHIP OF OSWEGO, DEFENDANT.

The plaintiff, by leave of court first had and obtained, amends his

petition as follows, by inserting after the fourth line, on page three of said petition, the following, to wit:

That the above bonds are a part of a series of one hundred bonds, of a thousand dollars each, voted and issued by the defendant to the Missouri, Kansas and Texas Railroad Company, a railroad corporation organized under the laws of the State of Kansas, in pursuance of a contract entered into and executed by the defendant and said railroad company, wherein the defendant, in consideration that said railroad company would build its line of railroad to said Oswego Township, & deliver to it one hundred thousand dollars of said railroad company's stock, did agree to execute and deliver to said railroad company
32 one hundred thousand dollars of its bonds of the character above described.

And the plaintiff avers that *that* the said railroad company performed all the conditions-pecedent of said contract, and the defendant, in consideration thereof, executed and delivered to said railroad company the one hundred thousand dollars of bonds aforesaid, and received from it therefor one hundred thousand dollars in its paid up stock, which stock the defendant still holds.

And the plaintiff further says that after the execution of said bonds, during the year 1870, the defendant did assess and levy, and cause to be assessed, levied, and collected, a tax upon all the taxable property in said township, and the inhabitants of said township did pay said tax so levied, and with the money derived from said tax the said township did pay all the interest due on said bonds on the 1st day of July, 1871, and did take up all the coupons on said bonds then due, and, in the year 1871 the defendant did cause a like levy of taxes to be made on all its taxable property, and the inhabitats of said township did pay all the taxes levied on the property of said township, and out of the money so collected the defendant did pay all the interest on said bonds due on the 1st day of July, 1872, and took up and paid all the
33 coupons then due on said bonds, and after the payment of said interest & coupons as aforesaid the coupons sued on were assigned, transferred, and delivered to the plaintiff in good faith and for a valuable consideration, and before the said coupons became due and payable.

ALFRED ENNIS,
C. M. FOSTER,
Attys. for Plff.

(Endorsed:) No. 949. George O. Marcy vs. The Township of Oswego. Amendment to petition. Filed Jany. 28, 1875. A. S. Thomas, clerk.

And on this day, to wit, February 9, 1875, the said defendant filed in the clerk's office of said court its answer to amendment to petition in said entitled cause; which answer, with the endorsements thereon, is in the words and figures following, to wit:

Answer to amendment of petition.

In the U. S. circuit court for the district of Kansas.

GEORGE O. MARCY
vs.
THE TOWNSHIP OF OSWEGO.

And now, at this day, comes the defendant, by its attorneys, F. A.

Bettis and H. G. Webb, and, reaffirming it answer heretofore filed in this action, specially and generally denies each and every material allegation in the amendment to the petition filed in said action on the 28th day of January, 1875.

F. A. BETTIS &
H. G. WEBB,
Attys. for Defendant.

34 (Endorsed:) No. 949. In the U. S. circuit court for the district of Kansas. George O. Marcy vs. The Township of Oswego. Answer to amendments to petition. Filed February 9, 1875. A. S. Thomas, clerk.

And on this day, to wit, June 9th, 1875, in the June term, A. D. 1875, of said court, in the record of the proceedings thereof, is the following entry, to wit:

Journal-entry.

GEORGE O. MARCY
vs.
THE TOWNSHIP OF OSWEGO. } 949.

Now come the parties herein, by their attorneys, and the defendant's demurrer to the plaintiff's second ground of reply was argued by counsel and by the court sustained, and thereupon, to try the issues herein, come a jury, to wit, W. M. Hamm, S. A. Sawyer, A. K. Lowe, D. L. Morse, O. M. Smith, Jas. Fordin, Thos. J. Darling, D. Munford, L. M. Briggs, Calvin Smith, Wm. Sexton, and R. B. Noble, twelve, good and lawful men of the body of the district of Kansas, who, being duly empanelled and sworn to well and truly try the issues joined herein and the matters submitted to them, and a true verdict give according to the law and the evidence, after hearing the evidence, the arguments of counsel, and the instructions of the court, return the following verdict, to wit:

"We, the jury, find the issues joined in the above-entitled action in favor of the defendant.

"CALVIN SMITH,
"*Foreman.*"

35 It is therefore ordered, adjudged, and decreed by the court that the defendant go hence without day, and have and recover of and from the said plaintiff its costs herein expended, taxed to $, and that execution issue therefor.

And on this day, to wit, June 18th 1875, in the June term, A. D. 1875, of said court, in the record of the proceedings thereof, is the following entry, to wit:

Journal-entry.

GEORGE O. MARCY
vs.
THE TOWNSHIP OF OSWEGO, IN THE COUNTY of Labette, and State of Kansas. } 949. Certificate of division.

Be it remembered that, upon the trial of the foregoing-entitled ac-

tion, the plaintiff therein proved by competent evidence that the bonds and coupons set out in and made a part of the petition in said action, the same being a part of a series of one hundred thousand dollars of bonds voted and issued by the defendant, were so voted and issued in strict compliance with the requirements of an act of the legislature of the State of Kansas, entitled "An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same," approved February 25th, 1870, unless the said bonds were voted and issued in excess of the amount that the defendant
36 was at the time authorized to so vote and issue.

The plaintiff further proved by competent evidence that the said bonds to which the interest-coupons sued on belonged were on the 29th day of May, 1872, duly registered in the office of the auditor of the State of Kansas according to law, and that the said auditor of the State of Kansas, under his hand and official seal, in writing, certified the fact of such registration upon each of said bonds; a copy of which said certificate of registration is also filed with and made part of the petition in said action. That thereupon the defendant introduced in evidence the assessment-rolls of the defendant for the years 1869, 1870, & 1871, to prove the value of the taxable property of the defendant at the time of the voting and issuing the said bonds. That the value of the taxable property of the defendant, as shown by the said assessment-rolls, was as follows, to wit: For the year 1869, $107,000.00; for the year 1870, $384,000.00; and for the year 1871, $350,000.00. That thereupon judgment was rendered for the defendant.

That upon the trial of said action the following questions arose, to wit:

First. Whether or not in said action, by bona-fide holder for value of the coupons sued on, it could be shown as a defense to a recovery upon such coupons that at the time of the voting and issuing the said series of one hundred thousand dollars of bonds, the value of
37 the taxable property of the defendant was not of an amount sufficient to authorize the voting and issuing the whole series of one hundred thousand dollars of bonds.

Second. Whether or not the assessment-rolls of the defendant were competent evidence to prove the value of the taxable property of the defendant at the time of the voting and the issuing the said bonds; and if so, then which assessment-roll was to govern, that for the year 1869, 1870, or 1871.

Third. Whether or not evidence other than the assessment-rolls of the defendant was admissible to prove the actual value of the taxable property of the defendant at the time of the voting and issuing the said bonds.

That upon each of the foregoing questions a division of opinion occurred, and the said questions are hereby certified by the judges of said court.

SAM. F. MILLER.
C. G. FOSTER.

And on this day, to wit, June 18, 1875, the said plaintiff filed in the clerk's office of said court his appeal-bond in said entitled cause; which appeal-bond, with the endorsement thereon, is in the words and figures following, to wit:

Appeal-bond.

Supreme Court of the United States.

GEORGE O. MARCY
vs.
THE TOWNSHIP OF OSWEGO, LABETTE COUNTY, Kansas.

38 Know all men by these presents that we, George O. Marcy and Alfred Ennis, are held and firmly bound unto the township of Oswego, Labette County, Kansas, in the sum of two hundred dollars, to be paid to the said Oswego Township, or its assigns, to the payment , well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our heirs and executors, and administrators, firmly by these presents.

Dated this 18th day of June, 1875.

Whereas the above-named George O. Marcy hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Kansas: Now, therefore, the condition of this obligation is such, that if the above-named George O. Marcy shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEORE O. MARCY
By ALFRED ENNIS.
ALFRED ENNIS.

Taken and approved by me this the 18th day of June, 1875.

(Endorsed:) No. 949. George O. Marcy vs. The Township of Oswego, Labette County, Kansas. Bond. Filed June 18th, 1875. A. S. Thomas, clerk.

39 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings had in the case of George O. Marcy vs. Oswego Township, No. 949, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this thirteenth day of July, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

40 UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea which is in said circuit court before you, between George O. Marcy and the township of Oswego, in the county of Labette, in the State of Kansas, a manifest error hath happened, to the said

George O. Marcy, as by his complaint appears; we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under the seal of said court, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the second Monday in October, 1875, in the Supreme Court of the United States to be then and there held, that, the record and
41 proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of h e United States, the 18 day of June, 1875.

[SEAL.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

(Indorsed:) No. 949. George O. Marcy vs. The Township of Oswego, Labette County, Kansas. Writ of error. Filed June 18, 1875. A. S. Thomas, clerk. Alfred Ennis, C. M. Foster, & W. S. Brown, attys. for plaintiff.

42 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

To the Township of Oswego, Labette County, Kansas:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the city of Washington, in the District of Columbia, on the second Monday in October, 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein George O. Marcy is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 18th day of June, 1875.

SAM. F. MILLER.

43 STATE OF KANSAS,
Labette County, ss:

The Township of Oswego, in the county of Labette, and State of Kansas, hereby acknowledges service of the within citation, and agrees to appeal to the action therein named, at the time and place therein named, this the 30th day of June, 1875.

F. A. BETTIS,
Atty. for Oswego Township.

(Indorsed:) No. 949. George O. Marcy vs. The Township of Oswego' Labette County, Kansas. Citation. Filed June 18, 1875. A. S. Thomas, clerk. Filed July 5, 1875. A. S. Thomas clerk.

44 UNITED STATES OF AMERICA:

In the Supreme Court of the United States. October term, in the year of our Lord one thousand eight hundred and seventy-five.

GEORGE O. MARCY, PLAINTIFF IN ERROR
vs.
THE TOWNSHIP OF OSWEGO, LABETTE COUNTY, Kansas, defendant in error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said George O. Marcy, by Alfred Ennis, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit: That said circuit court of the United States for the district of Kansas rendered judgment in favor of the defendant in error and against the plaintiff in error, when said judgment ought to have been rendered in favor of the plaintiff in error and against the defendant in error; and the said George O. Marcy prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment.

ALFRED ENNIS,
Atty. for Plaintiff in Error.

(Indorsement on cover:) No. 729. George O. Marcy, plaintiff in error, vs. The Township of Oswego, in the county of Labette, and State of Kansas. Kansas, C. C. U. S. Filed 16th October, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

GEORGE O. MARCY, *Plaintiff in Error*,
vs.
THE TOWNSHIP OF OSWEGO, IN THE COUNTY OF LABETTE, AND STATE OF KANSAS.

ARGUMENT OF ALFRED ENNIS AND A. L. WILLIAMS,

For Plaintiff in Error.

GEO. W. MARTIN, Printer and Binder, Topeka, Kansas.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1875.

GEORGE O. MARCY, *Plaintiff in Error*,
vs.
THE TOWNSHIP OF OSWEGO, IN THE COUNTY OF LABETTE, AND STATE OF KANSAS.

ARGUMENT OF ALFRED ENNIS AND A. L. WILLIAMS,

For Plaintiff in Error.

STATEMENT OF THE CASE.

This was a suit upon thirty coupons. The bonds to which the coupons were attached, amounting in the aggregate to $100,000, were issued July 1, 1870, by Oswego Township, to the M. K. & T. R. R., in payment for stock in said road.

The bonds, after setting forth a promise, for value, to pay said railroad, or bearer, the sum of $1,000 on the first day of July, 1890, at the Tenth National Bank of New York, with interest payable annually at the rate of seven per cent., conclude with this recital: "This bond is executed and issued "by virtue of and in accordance with an act of the Legisla- "ture of said State of Kansas, entitled 'An act to enable "municipal townships to subscribe for stock in any railroad, "and to provide for the payment of the same,' approved Feb-

"ruary 25th, 1870, and in pursuance of and in accordance "with the vote of three-fifths of the legal voters of said town- "ship of Oswego, at a special election duly held on the 17th "day of May, A. D. 1870."

Three defenses were interposed by the pleadings, but only one is here in controversy, and that is, substantially, that the bonds were voted and issued in strict compliance with all the provisions of the law authorizing their issue, *except* that the amount voted and issued ($100,000) was more than the Township was authorized to vote and issue on July 1st, 1870. On the trial it was admitted that all of the bonds in controversy were duly registered by the Auditor of State on the 29th day of May, 1872.

The defendant then proved by the assessment rolls of the defendant that the value of the taxable property of the Township was as follows: For the year 1869, $107,000; for the year 1870, $384,000; and for the year 1871, $350,000. Thereupon the plaintiff offered to prove by other testimony than the assessment roll the actual value of the taxable property at the time of voting and issuing the bonds. The trial resulted in a verdict for defendant. In the trial of the case three questions arose, upon each of which there was a division of opinion. These questions — which are the only ones before this court — were as follows:

"*First:* Whether or not in said action, by a *bona fide* holder for value of the coupons sued on, it could be shown as a defense to a recovery upon such coupons that at the time of the voting and issuing the said series of one hundred thousand dollars of bonds, the value of the taxable property of the defendant was not of an amount sufficient to authorize the voting and issuing the whole series of one hundred thousand dollars of bonds.

"*Second:* Whether or not the assessment rolls of the defendant were competent evidence to prove the value of the

taxable property of the defendant at the time of the voting and the issuing of the said bonds; and if so, then which assessment roll was to govern, that for the year 1869, 1870, or 1871?

"*Third:* Whether or not evidence other than the assessment rolls of the defendant was admissible to prove the actual value of the taxable property of the defendant at the time of the voting and issuing the said bonds."

ARGUMENT.

The law which limits the amount of bonds which a township may issue is as follows: "*Provided,* That the amount of "bonds voted by any township shall not be above such an "amount as will require a levy of more than one per cent. "per annum on the taxable property of such township to pay "the yearly interest on the amount of bonds issued."

With this law in view we proceed to discuss the questions, but not in the order above presented.

The second question must, we think, be decided against us. Assuming that the defense of over-issue is good as against a *bona fide* holder for value, we are satisfied that the assessment rolls are competent, but by no means conclusive, evidence of the value of the taxable property of the township at the time of the voting and issuing of the bonds. And it is immaterial in this case, for the purpose of solving the second question, which assessment roll governs, for the *assessed* value of the property was not sufficient during any of the time proved to authorize the issue of $100,000 of bonds. But for the purpose of arguing the third question, it is material to determine which assessment roll governs. The assessment roll for the year 1870 governs in this case. The value of the property at the time when the bonds are voted determines the question of over-issue.

The third question in the order in which they appear in the certificate of division of opinion may be thus stated:

Are the assessment rolls of the township conclusive proof of the value of the taxable property in the township?

What is the value of the taxable property of a township? It will be conceded that it is the full actual value of all property in the township subject to taxation, but it will be urged that the assessment roll is the only evidence admissible to prove that value. Is the last proposition correct?

We may remark here that there is nothing in the laws of Kansas investing an assessor's return with any peculiar sanctity. It is merely a convenient aid in our revenue system, to determine two things for the sole purpose of taxation:

1. The property subject to taxation in a township.
2. Its value.

It is conclusive on neither point, and may be impeached in a variety of ways. In the first place it is the duty of the County Board to examine and correct it. In the discharge of this duty the Board may increase or diminish the assessed valuation of all or any part of the property assessed. It may strike property from the list or it may add property omitted by the Assessor. Even the County Clerk may do this without consulting either the Board or the Assessor. When the County Board and Clerk are through, the State Board of Equalization re-examine the whole question, and may at will, lessen or increase the assessment. Any taxpayer may impeach either fact found by the Assessor. If his property has been valued at an exorbitant rate, he may, if guilty of no *laches* in the assertion of his rights, apply successfully to a court for relief. If he has property not taxable and it is placed on the assessment rolls for taxation he may enjoin the collection of the tax. It being the duty

of the Assessor to list only such property as is subject to taxation and to assess it at its true value, the presumption is that he does his duty, and his return is *prima facie* evidence of the two facts. But this presumption and this *prima facie* case may be impeached. If this were not so our revenues would depend entirely upon the whims of the Assessors, and would be abundant or scant as our Assessors happened to be industrious and honest, or shiftless and dishonest. And the bond-holders would be utterly in their power, for to them would be committed the duty of determining the question of the validity of all bonds issued, and from their determination there would be no appeal. Suppose, in this case, the assessment roll of 1871 must be resorted to to determine whether there was an over-issue of bonds: would not the Assessors—if their returns cannot be contradicted—have the power to invalidate these bonds by their own wrongful acts? They assess the property of Oswego Township at $350,000, for instance, and the bond-holders and all others are powerless, although it may be a fact of general notoriety, and susceptible of the clearest proof, that the real value exceeds three millions!

The people of the township are silent, of course, for they escape the payment of their debts and avoid their share of the general taxes. If the assessment roll is conclusive evidence as to the value of the property it is equally conclusive that it contains all the taxable property in the township. In that case the assessor might entirely omit nine-tenths of the taxable property from his list, and this plaintiff, although in possession of abundant proof of the fact, would be compelled to submit in silence to the wrongful act of his debtor, acting through its agent, by which he loses $30,000 and the wrong-doer makes it.

Did the Legislature intend to make the assessment rolls conclusive evidence in this case? If it did, it was very easy to have said so. It would have limited the amount to be issued by the term, "assessed valuation," if such had been its intention. The terms, "assessed valuation" and "value of taxable property," are not convertible. Elsewhere in our bond laws (Laws of 1872, p. 110) the amount of bonds which counties are authorized to issue in aid of railroads is limited and restricted by the "assessed valuation" of property in the counties. Why not in this case? Because in this case it was intended to permit townships to issue such amount of bonds as a tax of one per cent. upon its actual taxable property would pay the interest on, and to leave to the County Commissioners the duty of determining that value.

With that tribunal, as with the Circuit Court, the assessment roll was *prima facie* evidence only. It had the right to inform itself by other testimony of the actual value of the property in the township; it exercised that right, determined that the value of property in the township was sufficient to authorize the issue of the amount of bonds petitioned for, and issued the bonds.

Cases might arise where the Board would be compelled to resort to other testimony because no assessment had ever been made. The County Board have complete control of townships, and may divide, reorganize or create them. In the last case a petition for the voting of bonds would have to be refused on the ground that no assessment roll was in existence, notwithstanding it was a well-known fact that the township as created had taxable property to the amount of millions of dollars; or the Board would have to take other evidence, and, being satisfied therewith, order the election and issue the bonds.

To show the necessity of resorting to other evidence than the assessors' return to show the *true* value of all taxable property, we may state that in this case the plaintiff offered to prove that property assessed by defendant's assessor at $250 was actually worth $4,000!

THE GOVERNING QUESTION IN THIS CASE, HOWEVER, IS THE FIRST:

"Whether or not in said action, by a *bona fide* holder for value of the coupons sued on, it could be shown as a defense to a recovery upon such coupons, that at the time of the voting and issuing the said series of one hundred thousand dollars of bonds, the value of the taxable property of the defendant was not of an amount sufficient to authorize the voting and issuing the whole series of one hundred thousand dollars of bonds."

An elucidation of this question involves (1) an examination of the bonds; (2) the law under which they were issued; and (3) the effect of registration upon these bonds.

THE BONDS.

The bonds read as follows:

$1,000.] UNITED STATES OF AMERICA.

STATE OF KANSAS, TOWNSHIP OF OSWEGO, LABETTE COUNTY.

Know all men by these presents, That the Township of Oswego, in the County of Labette, State of Kansas, hereby for value received acknowledges itself to owe, and promises to pay, the Missouri, Kansas and Texas Railway or bearer, one thousand dollars, lawful money of the United States of America, which sum of money the said Township of Oswego promises to pay on the first day of July, A. D. 1890, at the Tenth National Bank in the city of New York, with interest thereon at the rate of seven per centum per annum, payable at said National Bank on the first day of July in each year, on presentation and surrender of the annexed coupons as they severally become due. This bond is executed and issued by virtue of and in accordance with an act of the Legislature of said State of Kansas, entitled "An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same," approved February 25, 1870, and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said Township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870.

In testimony whereof, the Board of County Commissioners of the said

county of Labette has caused this bond to be issued, in the name and in behalf of said Township of Oswego, and to be signed by the Chairman of said Board of County Commissioners, and attested by the County Clerk of the said county, under its seal, this 1st day of July, A. D. 1870.

{SEAL OF LABETTE COUNTY, KANSAS.} L. C. HOWARD, *Clerk.*
WILLIAM STEEL, *Chairman.*

These bonds are negotiable in form, in fact and in law. The negotiability of municipal bonds is recognized by all the English and American courts, with the single exception of an isolated Pennsylvania case; and this court, in the case of *Mercer County vs. Hacket*, speaking on this subject, very correctly states the true doctrine in the following language: "This species of bonds is a modern invention, "intended to pass by manual delivery, and to have the "qualities of negotiable paper; and their value depends "mainly upon this character. Being used by States and "corporations, they are necessarily under seal. But there "is nothing immoral or contrary to good policy in making "them negotiable, if the necessities of commerce require "that they should be so. A mere technical dogma of the "courts or the common law cannot prohibit the commercial "world from inventing or using any species of security "not known in the last century. Usage of trade and "commerce are acknowledged by courts as part of the "common law, although they may have been unknown to "Bracton or Blackstone. And this malleability to suit the "necessities and usages of the mercantile and commercial "world is one of the most valuable characteristics of the "common law. When a corporation covenants to pay "bearer and gives a bond with negotiable qualities, and by "this means obtains funds for the accomplishment of the "useful enterprises of the day, it cannot be allowed to evade "the payment by parading some obsolete judicial decision "that a bond, for some technical reason, cannot be made "payable to bearer."

Besides this, if other authority is needed, the laws of Kansas expressly make bonds negotiable. Being negotiable, they are clothed with all the rights and immunities of other negotiable securities. And innocent holders for value are as completely protected from the defense of prior equities between the original parties as the holders of any other form of negotiable securities.

This logical result of the admitted negotiability of this class of securities has been consistently followed by this court, as numerous decisions show. And as often as the position has been assailed this court has reaffirmed it—each succeeding decision reasserting the doctrine with added emphasis. So that the law may now be safely asserted to be: *that if a lawful authority exists to issue bonds, and they are issued for the purposes allowed by the law, executed by the proper officers, with a recital that all the conditions of the law have been complied with,* NO *defense seeking to impeach their validity can be interposed against the innocent holder for value, without notice, unless the invalidity is apparent upon the face of the bonds, or can be made to appear from an examination of the law authorizing their issue.* In other words, in such a case the municipality issuing such bonds would be estopped by the recitals in the bonds from showing any fact outside of the bonds themselves, and the law under which they were issued, as a defense to their validity.

This may be stating the doctrine broadly, but it is, it seems to us, the necessary logical result of the law as frequently laid down by this court.

Knox County vs. Aspinwall is the leading case on this subject. In that case Knox county was authorized to take stock in a railroad, paying therefor in bonds, "*provided a "majority of the qualified voters of said county, at any annual*

"*election, shall vote for the same.*" The defense was that no proposition had carried by a vote of a majority of the qualified voters of the county, held in the manner prescribed by the law. It was conceded by the court that the vote was not had in conformity with the law, and that the authority for the issuance would be wanting were it not for an underlying question, viz., Who should determine whether the election had been properly held? The court held that from the very nature of the case that duty devolved upon the Board; that to issue the bonds without first having ascertained this fact was a clear violation of duty; and that, having issued the bonds with a recital therein contained of having complied with the law, it was too late, even in a direct proceeding, to assert the want of authority to issue against a *bona fide* holder of the bonds. The recital in the bonds amounted to an *estoppel in pais.* The court say:

"Another answer to this ground of defense is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription, by the Board, to the stock of the railroad company, and the issuing of the bonds.

"'The bonds on their face import a compliance with the law under which they were issued.

"'This bond,' we quote, 'is issued in part payment of a subscription of two hundred thousand dollars, by the said Knox county, to the capital stock, &c., by order of the Board of Commissioners, in pursuance of the third section of an act, &c., passed by the General Assembly of the State of Indiana, and approved 15th January, 1849.' The purchaser was not bound to look further for evidence of a compliance with the conditions of the grant of power."

So in *Royal British Bank vs. Tarquand* it was said—and approved by this court upon several occasions:

"We may now take it for granted that the dealings with these companies (corporations) are not like dealing with other partnerships, and that the parties dealing with them are

bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done."

And this doctrine, though applied to a private corporation, is held by this court to be applicable to municipal corporations.

In *Bissell vs. Jeffersonville*, 24 Howard, p. 287, the same doctrine is held, and *Knox vs. Aspinwall* cited and approved.

The defense in the Jeffersonville case was the failure to present to the city council a petition signed by three-fourths of the legal voters, asking that a certain subscription to a railroad be made, and the question was, Had the defendants the right to prove that fact by parol testimony? It was stated by the court that, "unless three-fourths of the legal "voters had petitioned, it is clear that the bonds were issued "without authority." But it was further held that the determination of that question was left to the common council, the tribunal to which the petition was addressed; that by issuing the bonds they had determined in favor of the sufficiency of the petition, and that it was too late to raise that question against *bona fide* holders of the bonds.

In the case of *Moran vs. Miami County*, 2 Black., 722, the case of *Knox vs. Aspinwall* is again approved, and language used which admits of no misconstruction. And it is precisely in point in our case. The court say:

"In our leading case upon the subject, that of the *Commissioners of Knox County vs. Aspinwall et al.*, the suit having been brought for the interest due upon coupons annexed to one hundred and forty-two bonds, in which the main ground of defense was, that a board of commissioners had not power

to execute them, and that on such account they were not binding upon the county of Knox, our answer and judgment was, that the bonds on their face import a compliance with the law under which they were issued; and that the purchasers of them were not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them."

After quoting at some length, and approving the case of *British Bank vs. Tarquand*, the court further say:

"But the real point in this case, as made by the counsel of the plaintiff in error, and sustained in argument by numerous adjudicated cases, was, that as it is declared in the bonds that they were issued by the Board of Commissioners of Miami county by order or resolution, pursuant to the statute authorizing the county to borrow money, passed at a regular meeting of the Board, to be used by the Peru and Indianapolis Railroad, payable to the company or bearer, for a loan to the county; that the *bona fide* holders, whether so by endorsement or delivery, had a right to infer that the bonds had been lawfully issued, by which the county of Miami is estopped in a suit for the recovery of the interest, from denying by pleas that its bonds had been issued to the Peru and Indianapolis Railroad for a loan of money to the county of Miami. We think and adjudge that the recitals in the bonds are conclusive, constituting an *estoppel in pais* upon the defendants in this suit."

It would be difficult to express a doctrine more forcibly, and we think it will be seen at a glance that it exactly decides the law of our case.

In *Gelpecke vs. City of Dubuque*, the court decide and refer to the Knox County case as also deciding that, "when a cor-"poration has power, under any circumstances, to issue nego-"tiable securities, the *bona fide* holder has a right to presume "they were issued under the circumstances which give the "requisite authority, and they are no more liable to be im-"peached for any infirmity in the hands of such a holder "than any other commercial paper."

And in *Mercer County vs. Hacket*, 1 Wall., 83, the court say:

"We have decided in the case of *Commissioners of Knox County vs. Aspinwall* that where the bonds on their face import a compliance with the law under which they were issued the purchaser is not bound to look further. The decision of the Board of Commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but *after* the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question."

In *Rogers vs. Burlington*, 3 Wall., 654, the same doctrine is held.

In *Supervisors vs. Schenck*, 5 Wall., 772, the court again use the precise language last quoted, preceded by the words "the decision of this court is that when," &c. The court also say:

"Argument of the defendants proceeds upon the ground that if they can show that the order for the election emanated from the wrong source, the plaintiff, although an innocent holder for value, cannot recover: but it is clear that in a case like the present, where the power to issue the bonds was fully vested in the corporation, the proposition cannot be sustained. On the contrary, it is settled law that a negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in point of fact issued for a purpose, and at a place not authorized by the charter of the corporation."

In *City of Lexington vs. Butler*, the court say:

"Holders of such instruments [municipal bonds] if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the defense of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments. Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and to issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this Court have established the rule that when a corporation has power

under any circumstances to issue negotiable securities the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

In *Grand Chute vs. Winegar*—a case so peculiar in its hardship that relief would have probably been afforded if it could have been done without departing from the law so frequently laid down by this court—all the former decisions on the point were referred to, approved and followed, and the law again stated to be as held in *Meyer vs. The City of Muscatine*, "that if the legal authority was sufficiently compre-"hensive, a *bona fide* holder for value has a right to presume "that all precedent requirements have been complied with."

In *St. Joseph Township vs. Rogers*, the court state, in stronger language than is used in the case itself, the force of the decision in *Knox County vs. Aspinwall.* The court say:

"*Knox County vs. Aspinwall:* Non-compliance with one of the conditions was clearly shown in that case, as the notices of the election as required by law had not been given in any form, but the decision was that the question as to the sufficiency of the notice and the ascertainment of the fact whether the majority of the votes had been cast in favor of the subscription, was necessarily left to the inquiry and judgment of the County Board, as no other tribunal was provided for the purpose; and the court held that after the authority had been executed, the bonds issued, and they had passed into the hands of innocent holders, it was too late, even in a direct proceeding, to call the power in question, and that it was beyond all doubt too late to call the power in question to the prejudice of a *bona fide* holder of the bonds in a collateral way, which is attempted to be done in the case before the court."

In the course of the opinion, the case of the *Royal British Bank vs. Tarquand* is again referred to and approved. In the latter case it was held, this court say: "Want of author-"ity to execute the bond, it was conceded, would be an an-

"swer to the action, but it was denied that a mere excess of "authority by the directors would have that effect, unless it "appeared that the plaintiff had knowledge of the fact."

In 11 Paige, 635, is a case in which the law on this subject in relation to private corporations is thus stated:

"A negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the corporation, and in violation of the laws of the State where it was actually issued."

This decision was cited and approved, held to apply as well to municipal as to private corporations, and the language above quoted embodied in the opinion of this court in the case of *Supervisors vs. Schenck.*

Does not our case fall within the spirit of all the decisions quoted?

THE LAW UNDER WHICH THE BONDS WERE VOTED.

The bonds in controversy were issued in pursuance of chapter 90, Laws of Kansas, 1870, p. 189.

The first two sections of the law are as follows:

"SECTION 1. Whenever fifty of the qualified voters, they being freeholders, of any municipal township in any county in this State, shall petition in writing the Board of County Commissioners of such county to submit to the qualified voters of snch township a proposition to take stock, in the name of such township, in any railroad proposed to be constructed into or through such township, and shall in such petition designate the railroad company and the amount of stock proposed to be taken, and the mode and terms of payment for the same, together with the conditions of such subscription, if any, it shall be the duty of such Board of County Commissioners to cause an election to be held by the qualified voters of such township, to determine whether such subscription shall be made: *Provided,* That the amount of bonds voted by any township shall not be above such an amount as will require a levy of more than one per cent. per annum on

the taxable property of such township to pay the yearly interest on the amount of bonds issued.

"SEC. 2. The Board of County Commissioners shall make an order for holding of the election contemplated in the preceding section, and specify therein the amount of stock proposed to be subscribed, the mode and terms of payment, the name of the railroad company, the conditions of such subscription, if any, as may be named in the petition, the day the election is to be held, and prescribe the form of the ballots to be used at such election for and against such subscription."

From this law, it will be seen that there is nothing to prohibit the township of Oswego from subscribing stock to the amount of $100,000 and voting bonds to pay therefor. To determine whether it had that right was made to depend upon certain facts outside of the law; and these facts had to be ascertained by some person or board before the bonds could legally be issued. The County Board was authorized to execute the power designated in the law when certain facts, necessary to give it jurisdiction of the subject-matter, were shown to exist. In this case it was necessary to determine four things before the bonds could be voted and issued: 1. That a petition of fifty voters, who were also freeholders, had been presented to the Board, asking for an election; 2. That the petition designated "the railroad "company and the *amount of stock proposed to be taken, and "the mode and terms of payment for the same*, together with "the terms of such subscription, if any;" 3. That the taxable property of the township was of such a value that a tax of one per cent. thereon was sufficient to pay the yearly interest on the bonds; and 4. That three-fifths of the votes were in favor of the subscription of stock and issuance of bonds.

And before the bonds could be delivered it was necessary to know: 1. That the County Clerk had actually subscribed the stock in the name of the township; and 2. That the railroad was completed through the township. (See section

5 of said law.) These were all jurisdictional facts, and had to be determined *before* the Board could rightfully execute the power. Which tribunal should determine these questions—the Circuit Court, before whom they are sought to be impeached in a collateral way, or the Board, to which the execution of the power was properly intrusted? The doctrine running through all the cases we have cited applies with full force here. The facts upon which the right to act rested were to be determined *before* the execution of the power—not after. Who must determine the existence of these facts? Evidently the Board of Commissioners. In the Jeffersonville case, it was said that the duty devolved upon the Board because it was the fittest tribunal for that purpose, and because no other was designated. In this case it may be added that it was peculiarly the duty of the Board. The petition had to be presented to it for action; if the necessary jurisdictional facts were made to appear to its satisfaction, it had no discretion in the matter—it was *its duty* to order the election. The law made it the duty of the Board to canvass the vote and declare the result; to see that the Clerk made the subscription of stock; in short, it was invested by competent authority with competent authority to determine all questions connected with, or preliminary to, the issuance of the bonds.

It is immaterial that the defense in this case is excess of authority in the over-issue of bonds. It is an excess of authority to issue without having complied with all the other necessary precedent conditions to the grant of power, or rather a failure to comply with such conditions, makes the act void for want of authority. And this is as much so in one case as the other. But the difficulty is, with the township, that it is not allowed to show this now, because,

the bonds being in the hands of *bona fide* holders, it is, in the emphatic language of this court, too late.

If one of the facts necessary to give the Board jurisdiction of the subject-matter may be impeached, as against a *bona fide* holder, all may. The existence of sufficient taxable property to authorize the issuance of the amount of bonds voted is no more essential to the authority of the Board than the presentation of a petition signed by fifty voters and freeholders of the township. If the question of the sufficiency of taxable property may be inquired into in the court as a defense against an innocent holder, it would be equally competent to prove that no petition was presented, or, if presented, that some of the fifty signing were either not voters or not freeholders of the township. In fact, it would be the better defense, for it is much easier for the Board to determine the value of the taxable property of a township than the fact that the fifty petitioners are voters and freeholders. The defendant, then, can no more inquire now into the fact of over-issue than it can into the fact of the sufficiency of the petition upon which the election was called and the bonds voted. And the uniform decisions of this court preclude the idea of the latter inquiry after the bonds are issued.

It was urged below that the limitation of the amount to be issued is fixed by law, and that all parties are chargeable with notice. So are the presentation of a petition, and a vote of three-fifths of the voters, limitations and conditions attached to the grant of power, but, in the first as in the latter case, the fact of compliance with these conditions must be established by extrinsic evidence, by something outside of the statute. The law merely says certain things must be done, but leaves the question whether the things have been done to others, as in this case to the Board.

The distinction is obvious between a limitation of an amount fixed and definite in a statute, leaving nothing to be settled, and one where the limitation is definite enough in its meaning, but refers to some extrinsic fact to determine its amount. Thus a law declaring that no township should issue over $50,000 of bonds to a railroad would itself limit the amount to be issued without regard to any outside fact. And under such a law of course an issue of $100,000 would be void, because no question as to the amount would be left to the authority issuing the bonds, and the over-issue would be apparent on the face of the law, of which all parties must take notice.

If the case here were analogous to the one supposed, the invalidity of our bonds would be apparent from an examination of them and the law, and no other testimony would be needed. And the fact that other testimony is sought to be introduced to impeach the action of the Board, conclusively shows that the bonds are valid on their face and issued in accordance with the law.

The recital on these bonds is as follows:

"This bond is executed and issued *by virtue of and in accordance with* an act of the Legislature of said State of Kansas entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same,' approved February 25th, 1870, and in pursuance of and in accordance with the vote of three fifths of the legal voters of said Township of Oswego, at a special election *duly* held on the 17th day of May, 1870."

Can any recital more strongly express a compliance with the law under which they were issued? By virtue of and in accordance with the law! With how much of the law? With all of it, of course. The Board had, the recital says, done all the law required. A proper petition had been presented showing what amount of bonds the township desired

to issue, it had determined that the amount might be legally issued, it had called the election which had been *duly* held, three-fifths of the legal voters had voted for the bonds, and all the conditions annexed to the grant of power having been thus complied with, the Board—its authority being complete, it says—issued the bonds by virtue of, and in accordance with, the law.

In this case, as in *Knox County vs. Aspinwall*, "the pur-"chaser was not bound to look further for evidence of a "compliance with the conditions to the grant of power."

The corporation here having power under certain circumstances not only to issue bonds but to issue the amount issued, "the *bona fide* holder has a right to presume they "were issued under the circumstances which give the "requisite authority." If it is true that a bond, valid upon its face, is protected in the hands of an innocent holder, notwithstanding that it was issued for a purpose, and at a place not authorized by the charter of the corporation issuing it, and in violation of the laws of the State where it was actually issued, as this court say, it must be equally true that a bond, valid on its face, executed by the proper officers, for a purpose and at the place designated by law, is also protected in the hands of a *bona fide* holder.

In short, if these bonds are negotiable securities, they are governed by the law governing such securities. Here is the power to issue these bonds, for the purposes and to the amount issued, contingent upon certain facts to be ascertained by the very party authorized to issue them. They are issued, and contain a recital that they are issued in accordance with the grant of power; upon an examination of the grant of power, the purchaser sees that the bonds are authorized by it; he thereupon purchases, before due,

without notice of existing prior equities between the original parties, and holds the bonds freed from the taint of any infirmity.

THE REGISTRATION LAW.

If the general law applicable to negotiable bonds, heretofore cited, does not effectually deprive the makers of such bonds of the defense set up against *bona fide* holders, we have a statute law which does. This is known as the registration law, and was passed in 1872. It is on page 110, chapter 68, Laws of 1870. One peculiar feature of it was inserted for the express purpose, apparently, of evading the force of the decisions of this court. It was known, of course, that whatever the general rule as to the negotiability of municipal securities might be, the State, which authorized their issue, had the right to declare, by express enactment, that they could only be negotiable upon compliance with certain conditions. This right the State exercised by declaring in the registration law that bonds issued under its provisions "shall "not bear interest or be negotiable until after the delivery "and registration thereof."

This law was not passed until long after our bonds were issued and in *bona fide* holders' hands; but it was made the privilege of such holders to avail themselves of its provisions. It was passed, we say, to meet the very decisions we have cited, as a comparison between the law and the views of the courts on the subject of the negotiability of bonds will abundantly show. The rule that a municipality, by reciting in its bonds a compliance with the law authorizing their issue, was estopped to deny the regularity of their issue as against an innocent holder, was acknowledged to be sound; but it was thought inequitable and hard in many cases, and it was determined by statute law to avoid this rule, and to appoint

some higher officer than county officials to examine all bonds sought to be put upon the market, for the purpose of determining their regularity and legality. Without his sanction, no act of the parties issuing them, no recitals, could create an estoppel: with his sanction they went upon the market purged of all infirmities, with all prior equities cut off; or rather with an adjudication, under no circumstances to be impeached collaterally, that no prior equities existed. Hence the registration law, and the provision quoted.

The two sections of that law material to this inquiry are as follows:

"SEC. 14. Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the Auditor of State for registration, and the Auditor shall, *upon being satisfied that such bonds have been issued according to the provisions of this act*, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds *the fact that they have been regularly and legally issued;* that the signatures thereto are genuine, and that such bonds have been registered in his office according to law; for which registration and certificate the Auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof.

"SEC. 15. That the holders of bonds heretofore issued, or that may hereafter be issued, in pursuance of any contract heretofore made, under any law of this State, may have the benefits of this act by having such bonds registered in the office of said Auditor of State, as provided herein, for the registration of bonds [issued] by virtue hereof. It shall be the duty of the Auditor of State, upon the registration of any bonds not issued under the provisions of this act, within ten days thereafter, to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds."

If this law means anything, it means what we have said. It was intended to add to the value of our bonds by affording protection both to the bondholder and the municipality issuing bonds. If registered, the bonds, in *bona fide* hands, are protected against the defense of prior equities; if unreg-

istered, the counties are not estopped to deny the validity of the bonds, in whosoever hands they may be.

The certificate on these bonds, which is in strict conformity with the law, reads as follows:

"I, A. Thoman, Auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the Legislature, entitled 'An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872.

"Witness my hand and official seal, this 29th day of May, 1872.

{ SEAL OF THE AUDITOR OF STATE } { KANSAS, JAN. 29, 1861. }

A. THOMAN,
Auditor of State."

It will be admitted that the power which could create townships, and invest them with authority to issue bonds, could also delegate to any officer of its selection the power to determine whether any bonds thus issued had been issued in compliance with the law, with *all* the requirements of the law. This has been done, and we think the Auditor's certificate is conclusive, that the purchaser of bonds is not bound to look further.

In the Jeffersonville case, where the grant of power was limited by certain conditions, compliance with which was essential to the right to execute the power, it was held that the question whether these conditions, necessary to give jurisdiction of the subject-matter, had been properly complied with, was left to the determination of the very Board executing the power "because no other was designated." Here there is a grant of power with conditions precedent to its exercise, compliance with which is essential to give jurisdiction of the subject-matter; and the law which confers the power expressly designates the officer whose duty it is

to determine whether all the conditions have been complied with regularly and legally. It authorizes the Auditor to settle the question definitely, judicially. It is not a mere ministerial duty, requiring the exercise of no discretion. It permits him to investigate, to hear evidence, to satisfy himself; and it only becomes his duty to register bonds when he has become "satisfied that such bonds have been "issued according to the provisions of the law." His action, then, is final. It cannot, at least, be collaterally impeached. His certificate creates an estoppel against the municipality whose duly constituted agent he is. Registered bonds go upon the money markets of the East with the sanction of the State itself. They bear upon their face the statement, under the seal of the State, that the State which granted authority to issue bonds under certain conditions, has, by its appointed agent, examined the acts performed and the bonds issued in pursuance of such authority, and declares, as the result of such examination, that the authority has been legally exercised, that all the conditions precedent have been regularly and legally complied with!

Surely, if this does not authorize a prudent man to purchase bonds without looking further, there is no force in the repeated decisions of this court.

It may be asserted as a matter of general notoriety, that such is the effect in fact of registration. The only question buyers in the Eastern markets ask is, Are the bonds registered? If they are, they look no further; if not registered, they will have nothing to do with them.

It was the intention of the law to produce just this feeling: to make the buyer secure if bonds were registered; to make bonds unmarketable if not registered.

If any weight is to be attached to the repeated decisions

of courts as to the law generally governing securities of this kind, and the express statutory provisions on the same subject, we must recover in this case.

If a recital in a bond that the law has been complied with, backed up by the certificate of a State officer duly authorized to examine the proceedings upon which the validity of the bond depends, that the law has been in all things complied with, and the bond regularly and legally issued, can create an estoppel, then one exists here; and no defense, resting upon an alleged failure to regularly comply with one of the conditions annexed to the grant of power, can be sustained against a *bona fide* holder of the bonds.

Alfred Ennis
A. L. Williams.
attys for Plaintiff in error

No. 729.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

GEORGE O. MARCY, *Plaintiff in Error,*
vs.
THE TOWNSHIP OF OSWEGO, IN THE COUNTY OF LABETTE, AND STATE OF KANSAS.

ARGUMENT OF HENRY G. WEBB,

For Defendant in Error.

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ARGUMENT OF HENRY G. WEBB,

For Defendant in Error.

ACTION by Marcy, on coupons to Oswego Township bonds July 1st, 1870, to the M. K. & T. Railroad Co., in payment for stock in said road. Trial at June Term 1875 of Circuit Court. The questions arising on the trial, and the certificate of division of the judges of the court thereon, are set forth on pp. 15, 16, of the printed transcript of record.

These questions are as follows:

"*First:* Whether or not in said action, by a *bona fide* holder for value of the coupons sued on, it could be shown as a defense to a recovery upon such coupons that at the time of the voting and issuing the said series of one hundred thousand dollars of bonds, the value of the taxable property of the defendant was not of an amount sufficient to authorize the voting and issuing the whole series of one hundred thousand dollars of bonds.

"*Second:* Whether or not the assessment-rolls of the defendant were competent evidence to prove the value of the taxable property of the defendant at the time of the voting and the issuing the said bonds; and if so, then which assessment-roll was to govern, that for the year 1869, 1870, or 1871?

"*Third:* Whether or not evidence other than the assessment-rolls of the defendant was admissible to prove the actual value of the taxable property of the defendant at the time of the voting and issuing the said bonds."

I.

On the part of the defendant we have to submit, that the first question upon which the opinion of the court below was divided must be answered affirmatively, for the reasons that under the law of the State of Kansas, there was and is an entire want of power upon the part of the county commissioners to issue the $100,000 in bonds, the coupons to a part of which this action is based upon. Section 1 of chapter 90 of the Laws of Kansas for 1870, page 189, is as follows:

"Whenever, (etc., etc.;) it shall be the duty of such board of county commissioners to cause an election to be held by the qualified electors of such township to determine whether such subscription shall be made; *provided*, that the amount of bonds voted by any township shall not be above such an amount as will require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest on the amount of bonds issued."

The unmistakable meaning of said section is, that upon proper petition being presented to the county commissioners they shall cause an election to be held at which the voters of the township shall determine whether they will direct the subscription to stock of the road to be made by the commissioners *within the valuation limitation;* and if the voters so direct the subscription to be made, the commissioners shall order such subscription and issue bonds in the name of such

township, as provided in section 5 of said act. It is apparent, the powers of the *county commissioners* to make contracts and issue bonds in the name and on behalf of a *township* is not derived from direct legislative grant of such power — nor is it a power which the commissioners may exercise generally, as county commissioners — but it is a special power, conferred only by the performance of the precedent conditions from which such powers result; and it is *no greater* or other than the statute provides *shall result* from the performing of the precedent conditions.

The county commissioners, by the performing of the statutory precedent conditions on the part of the petitioners and voters, become clothed with power to issue bonds on behalf of the *township*, in the sum and to the amount the township may vote, which amount is *limited* by the valuation of the taxable property of the township.

The attention of the court is directed to the laws of Kansas, 1870, section 1, chapter 26, on page 64:

"The trustee, treasurer and clerk, or a majority of them, are hereby authorized and empowered to issue bonds."

Again, chapter 30, laws of 1870, page 72, section 1:

"The board of county commissioners, and authorities of incorporated cities, are hereby empowered to issue bonds."

In each case a direct legislative grant of power is found, the exercise of which is by subsequent provisions in the act conferring it directed and attempted to be controlled; while in the act under which the bonds in this case were issued, the language is, "*whenever*," etc. The meaning of which is, *when* certain things have been done another thing may be indulged in to a certain extent, and to such extent only — as the only power which results from the performing of the precedent conditions specified in said act is a definitely limited and restricted one. The proviso of section 1 of chapter

90 aforesaid is, "the amount of bonds voted *shall not exceed*," etc. We ask, are townships *subject to* the law, or are they *above* the law? May a township make a contract which the law prohibits the making of, and have it adjudged by the court a legal and binding one? It is true, that an act unauthorized, yea, in very terms prohibited by law, becomes competent authority for doing some other act for which no power or authority is claimed except that arising from the doing of the first illegal and prohibited act?

If the voting of these bonds was unauthorized, and prohibited by law, and the bonds were issued in excess of the amount for or in which they might lawfully have been issued, were they not void from the beginning? And if void in their inception, are they not void ever afterward? Or is it true that a note or bond given pursuant to an agreement, the making of which is prohibited by law, and which is void from the beginning, may become a valid obligation upon being transferred to a third person?

We are of the opinion the real question in this case is assumed by the plaintiff, and not maintained by him successfully in argument. By the plaintiff we are referred to the cases of *Knox County v. Aspinwall*, 21 How., 539; *Bissell v. Jeffersonville*, 24 How., 287; *Moran v. Miami County*, 2 Black, 722; *Rogers v. Burlington*, 3 Wall., 654; *Supervisors v. Schenck*, 5 Wall., 772, and other cases, which we think do not in any wise decide the question under discussion. In all those cases only two questions are decided; they are—*First*, The recitals in the bond of a municipal corporation, which bond was issued *by the officers of such corporation*, that the conditions precedent to its issuance had been performed, shall conclude the corporation upon that question, after the bond has passed into the possession of a *bona fide* holder; *Second*, Where municipal bonds have been issued by the

officers of a municipal corporation, the law will presume them to have been issued under such circumstances as will render them valid, if they might have been rightfully issued under some circumstances. But we submit, the *amount* for which a note or bond is given is not a circumstance *under which* it was given. Nor do the bonds involved in this action purport to have been executed by the officers of Oswego Township, but show upon their face they were not issued by such officers.

In the light of the decisions of this court above referred to, we ask under what circumstances might the township of Oswego have voted her bonds in an amount so great that a levy of one per cent. upon her taxable property will not pay the interest thereon? We shall anxiously await the court's solution of this problem.

But the plaintiff contends that the *recitals* in these bonds operate as an *estoppel* against Oswego township. This we deny. The assessment-rolls of and for every township are required by law to be filed and kept in the office of the *county clerk.* (Gen. Stat. of Kan., 1868, p. 1032, § 36, and p. 1040, § 61.) It was therefore the duty of the *county board,* when considering the petition of certain *electors* of Oswego Township to order an election to vote upon the question of taking $100,000 of stock in the M., K. & T. Rld., to examine the *assessment-rolls* of Oswego Township, and see whether the amount proposed was within their (the county commissioners') power to issue. The county commissioners who issue, the corporation which receives, and the party who purchases township bonds purporting to be issued under the authority of the act of 1870, will be presumed to know what facts were shown upon the records of the county, including the taxable property assessment of Oswego Township, and to know whether

the county board had or did not have authority to issue such bonds.

Is not the fact that the *officers of Oswego Township* did not issue these bonds, and that the officers of *another* municipal corporation did issue them, worthy of serious consideration? And may we not say that the contract evidenced by these bonds, (whether valid or void,) was not authorized nor made by the township? Is it not proper to say that the township authorized only (as it could only authorize) a *legal and valid* contract; and that the contract made by the county commissioners, in the name of the township, was not only unauthorized by the township, but wholly prohibited by statute? If so, is the township, as principal, bound by an illegal, a prohibited contract, which it did not authorize, and which it has not ratified? Certain *electors* of Oswego Township petitioned the county commissioners to order an election. The act and petition of such electors were not the act and petition of *Oswego Township,* a municipal corporation. The township, *as such*, did not petition for an election; it had no agency in calling, and no authority or direction in causing such election to be held. It did not make the subscription for stock in the railroad; it did not issue the bonds. *Is such township estopped by the recitals in such bonds* from showing that the county officers disregarded the provisions of the statute, and that such county officers acted without authority in ordering their clerk to make the subscription, and in issuing the bonds? The county board consists of three county commissioners. These commissioners and the county clerk are chosen for the term of two years. They are *county* officers, and in no sense are they *township* officers. Townships are separate and distinct municipalities, and elect their own officers, among them a trustee, a treasurer, and a clerk. (Gen. Stat.,

p. 1082.) Oswego Township did not, nor did its officers, have any voice in appointing the county board and county clerk as "agents" to act for the township. The statute forces the county board and clerk upon the township, as special agents, not only without any request or agency on the part of the township, but against its wishes and its interests, *if it is to be bound by their unauthorized and illegal acts.* Should not the acts of such special statutory agents be limited to express authority, and their acts in excess of express statutory authority, be held void? And should not this be so in all cases as to such of their acts as are *prohibited* by the statute?

II.

The second question upon which the court below was divided the plaintiff concedes must be decided against him, and we forbear to discuss it.

III.

The third question upon which the court below was divided, is—

"Whether other evidence than the assessment-rolls of the defendant was admissible to prove the actual value of the taxable property of the defendant at the time said bonds were voted?"

Upon this last question we have to submit: The law providing for the issuance of said bonds was enacted in the light of the then existing revenue laws of the state, and contemplated their payment, both principal and interest, by means of a fund to be created by ordinary taxation. To pay the interest, it contemplated that a tax should be levied not exceeding one per cent., not upon the actual value of the property for marketable purposes, but upon the taxable valuation as ascertained and determined by the agencies and instrumentalities then authorized and required by law to ascertain and declare the value of such property for the purposes of taxa-

tion. Section 6 of said act, requires the county commissioners in a proper case to levy a tax on the taxable property of the township for the payment of interest upon the bonds, and as the basis of such levy provides no unusual or new means for determining values; but does provide for the levy and collection of such tax as county and township taxes are levied and collected within such townships. Hence we are of the opinion, the county commissioners are referred to the *assessment-rolls*, and equalization of the assessment of such town, as the only basis of their levy; that to recognize or act upon any other would be wholly unauthorized; and that if we are right in this last view, an inquiry in court, as to whether the valuation of property within a township for taxable purposes is its real or actual value for some other purpose, is wholly immaterial, and therefore incompetent, and a useless and unavailing inquiry.

HENRY G. WEBB,
Attorney for Defendant.